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No. 10

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES HENRY MCELROY,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *United States v. Ruiz*, 536 U.S. 622 (2002), authorizes the prosecution to suppress favorable evidence material to punishment where the defendant pleads guilty without an agreed recommendation on punishment.

2. Whether undisclosed evidence that would have impeached the complainant's statements contained in the pre-sentence report is material to punishment.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INDEX TO APPENDIX	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	6
I. THE TEXAS COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT THE PROSECUTION HAS NO DUTY TO DISCLOSE FAVORABLE EVIDENCE MATERIAL TO PUNISHMENT WHERE THE DEFENDANT PLEADS GUILTY WITHOUT AN AGREED RECOMMENDATION ON PUNISHMENT	6
II. THE TEXAS COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT UNDISCLOSED EVIDENCE THAT WOULD HAVE IMPEACHED THE COMPLAINANT'S STATEMENTS CONTAINED IN THE PRE-SENTENCE REPORT IS NOT MATERIAL TO PUNISHMENT	14
CONCLUSION	18

TABLE OF CONTENTS – Continued

Page

INDEX TO APPENDIX

Appendix A

Findings Of Fact, Conclusions Of Law, And Order of the 179th District Court of Harris County, Texas 1a

Appendix B

Order of the Texas Court of Criminal Appeals 11a

TABLE OF AUTHORITIES

Page

CASES

Banks v. Dretke, 540 U.S. 668 (2004) 13

Brady v. Maryland, 373 U.S. 83 (1963) ..... *passim*

Giglio v. United States, 405 U.S. 150 (1972) 16

Kyles v. Whitley, 514 U.S. 419 (1995) 16

Napue v. Illinois, 360 U.S. 264 (1959) 16

Townsend v. Burke, 334 U.S. 736 (1948) 5, 16

United States v. Agurs, 427 U.S. 97 (1976) 15

United States v. Bagley, 473 U.S. 667 (1985) 15

United States v. Ruiz, 536 U.S. 622 (2002) 4, 5, 12, 13

United States v. Severson, 3 F.3d 1005 (7th Cir. 1993) 13

United States v. Tucker, 404 U.S. 443 (1972) 16

United States v. Weintraub, 871 F.2d 1257 (5th Cir. 1989) 12

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V 1, 12

U.S. CONST. amend. XIV 2, 12

FEDERAL STATUTE

28 U.S.C. § 1257(a) 1

TABLE OF AUTHORITIES – Continued

Page

RULES

SUP. CT. R. 10(a) 14, 17

SUP. CT. R. 10(c).....14, 17

PETITION FOR A WRIT OF CERTIORARI

James Henry McElroy respectfully petitions this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The findings of fact and conclusions of law of the 179th District Court of Harris County are not reported (Appendix A). The order of the Texas Court of Criminal Appeals denying habeas corpus relief based on the trial court's findings of fact and conclusions of law is not reported (Appendix B).

JURISDICTION

The Texas Court of Criminal Appeals denied habeas corpus relief on October 8, 2008. This petition is being filed within 90 days of that order. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall be . . . deprived of . . . liberty . . . without due process of law. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of liberty . . . without due process of law. . . ."

STATEMENT OF THE CASE

A. Summary Of The Issues

Petitioner pled guilty to sexual assault, and the court recessed the proceedings for preparation of a pre-sentence report (PSR). The PSR contained the complainant's statement to a deputy that petitioner forced her into his truck and, after they went to the grocery store, compelled her to perform oral sex on him. It also contained her more detailed statement to the probation officer that they had a platonic relationship and she accompanied him on the night in question because she had a few drinks and trusted him. It contained petitioner's statement to another deputy that he saw the complainant, whom he knew, walking down the street, offered her a ride, noticed that she had a crack pipe, and made her throw it away before she entered his truck; when he refused her request to take her to a particular apartment complex, she took off her clothes, exited the truck, and ran away screaming. It also contained his statement to the probation officer that he met the complainant on several previous occasions, including at a bar and a bikers' rally; that she accepted a ride and asked him to take her to an apartment complex to

buy drugs on the night in question; that, when he refused to do so, she got mad, took off her clothes, and jumped out of the truck; and that, in his opinion, she made the accusation because she was afraid of her husband and needed an excuse for being out late. Thus, whether the complainant was smoking crack cocaine and asked petitioner to take her to buy drugs was material to sentencing. The court sentenced petitioner to ten years in prison.

Petitioner filed a state habeas corpus application alleging that he was denied due process of law because the prosecutor failed to disclose contradictory statements that the complainant made to him and to correct her false and misleading statements in the PSR. The prosecutor testified at the evidentiary hearing that he interviewed the complainant while the case was pending. He told her that her story about how she ended up in petitioner's truck did not make sense, that he did not believe her, and that he did not think that a jury would believe her. When she persisted in her story, he said that he would probably have to dismiss the case unless he could explain to a jury why she was with petitioner. She then admitted that she had previously smoked crack cocaine on a motorcycle ride with petitioner while he drank whiskey; that she had previously pawned a ring to buy crack cocaine and that he retrieved it and returned it to her about three weeks before the night in question; and that there were at least two other occasions on which she had smoked crack cocaine in his presence. Instead of disclosing what she told him to defense

counsel, the probation officer, or the court, the prosecutor told defense counsel that he would not oppose probation if petitioner pled guilty without an agreed recommendation on punishment. Thereafter, when the court assessed ten years, it did not know about the complainant's statements to the prosecutor, which tended to corroborate petitioner's statements to the deputy and the probation officer.

The state trial court concluded that the prosecution has no duty to disclose favorable evidence material to punishment, as *Brady v. Maryland*, 373 U.S. 83 (1963), does not apply where the defendant pleads guilty in light of *United States v. Ruiz*, 536 U.S. 622 (2002). It further found and concluded that, even if *Brady* applied, the prosecutor had no duty to disclose the complainant's prior inconsistent statements and use of crack cocaine, as this evidence "was not material at sentencing, would not have been admissible, and would not have mitigated punishment." The Court of Criminal Appeals denied relief without written order based on the trial court's findings of fact and conclusions of law.

The Court should grant certiorari to clarify that *Brady* prohibits the prosecution from suppressing favorable evidence material to punishment where the defendant pleads guilty without an agreed recommendation on punishment. *Ruiz* held that a guilty plea is not rendered involuntary where the prosecution failed to disclose impeachment evidence relating to its informants and witnesses prior to entry of the plea. The suppressed evidence in *Ruiz* was relevant to

guilt-innocence and not to punishment. Most important, *Ruiz* did not overrule *Brady* and does not authorize the prosecution to suppress evidence material to punishment where the defendant pleads guilty without an agreed recommendation on punishment. Furthermore, this Court clearly held in *Townsend v. Burke*, 334 U.S. 736 (1948), that it violates due process for the sentencer to assess punishment on the basis of materially false information. Thus, the prosecutor had a duty to correct the complainant's false statements contained in the PSR prior to sentencing.

B. Procedural History

Petitioner pled guilty to sexual assault in cause number 1047063 in the 179th District Court of Harris County, Texas, before the Honorable J. Michael Wilkinson. Following a presentence investigation, the court sentenced him to ten years in prison on July 14, 2006. He did not appeal. Kenneth Junck represented him.

Petitioner filed a state habeas corpus application on April 9, 2007, and filed an amended application on December 7, 2007. Judge Wilkinson voluntarily recused himself. Carol Davies, a visiting judge, presided at an evidentiary hearing and entered findings of fact and conclusions of law recommending that relief be denied (Appendix A). The Court of Criminal Appeals denied relief without written order on October 8, 2008. *Ex parte McElroy*, No. WR-70, 481-01 (Tex. Crim. App. 2008) (Appendix B).

REASONS FOR GRANTING THE PETITION

I. THE TEXAS COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT THE PROSECUTION HAS NO DUTY TO DISCLOSE FAVORABLE EVIDENCE MATERIAL TO PUNISHMENT WHERE THE DEFENDANT PLEADS GUILTY WITHOUT AN AGREED RECOMMENDATION ON PUNISHMENT.

The complainant, a married woman with children, told a deputy that, about 3:00 a.m. on November 13, 2005, petitioner came to her home to bring her tequila, forced her into his truck, and drove to a grocery store to purchase items for his girlfriend. After they left the store, he parked on the street, grabbed her hair, forced her head into his lap, and compelled her to perform oral sex on him. She exited the truck, ran to a nearby residence, and called the police (C.R. 42-43).

Another deputy went to petitioner's home. Petitioner said that he saw the complainant, whom he knew, walking down the street, offered her a ride, noticed that she had a crack pipe, and made her throw it away before she entered his truck. When he refused her request to take her to a particular apartment complex, she took off her clothes, exited the truck, and ran away screaming (C.R. 43-44).

Petitioner was indicted for sexual assault (C.R. 66). He hired Kenneth Junck to represent him (3 R.R. 19). Prosecutor Dorian Cotlar proposed a plea bargain

that, if petitioner pled guilty without an agreed recommendation on punishment and allowed the court to assess punishment following a pre-sentence investigation, he would stand silent and not oppose probation (2 R.R. 24-25). Petitioner accepted the offer and pled guilty without an agreed recommendation on punishment on May 12, 2006; the court recessed the proceedings for preparation of a PSR (C.R. 258-59).

The PSR contained the complainant's statement to the deputy that petitioner forced her into his truck and, after they went to the grocery store, compelled her to perform oral sex on him (C.R. 47). It also contained her more detailed statement to the probation officer that she first met petitioner when he stopped his motorcycle and spoke to her as she was watering her yard; that he came by her home several months later to ask about buying a vehicle, and she gave him her telephone number; that they spoke regularly on the phone about her children and parents, his friends, cooking, and biking; and that she accompanied him on the night in question because she had a few drinks and trusted him (C.R. 49-50).[1] The complainant did not tell the probation officer that her relationship with petitioner involved drugs or that she had been smoking crack cocaine and

[1] The probation officer did not ask the complainant why she told a deputy that petitioner forced her into his truck if, in fact, she accompanied him willingly because she had been drinking and trusted him.

asked him to take her to buy drugs on the night in question (3 R.R. 14-16).

The PSR contained petitioner's statement to the probation officer that he met the complainant on several previous occasions, including at a bar and a bikers' rally; that she accepted a ride and asked him to take her to an apartment complex to buy drugs on the night in question; that, when he refused to do so, she got mad, took off her clothes, and jumped out of the truck; and that, in his opinion, she made the accusation because she was afraid of her husband and needed an excuse for being out late (C.R. 48-49).

The court found petitioner guilty and sentenced him to ten years in prison on the basis of a PSR reflecting the complainant's assertions that they had a platonic relationship and she accompanied him on the night in question either because he forced her into his truck or because she had been drinking and trusted him, and his assertion that she made a false accusation because she had been smoking crack cocaine and got mad when he would not take her to buy drugs. Thus, whether the complainant was smoking crack cocaine and asked petitioner to take her to buy drugs was material to sentencing.

Cotlar disclosed to present counsel during the habeas investigation that the complainant told him that petitioner had supplied her with crack cocaine on two or three occasions in the hope of having sex (C.R.

145).[2] Petitioner filed a motion requesting that the trial court order the State to produce any evidence that would show that the prosecution was aware at the time of sentencing that the complainant had used crack cocaine on the night in question or had previously obtained crack cocaine from petitioner (C.R. 35-37). The court ordered the State to disclose Cotlar's handwritten notes of an interview with the complainant on April 20, 2006, which reflected that she "had smoked crack at some point" and that she had a relationship with petitioner that involved drugs (C.R. 146-49).[3] Following the disclosure of these notes, Judge Wilkinson ordered an evidentiary hearing and recused himself because of his friendship with Cotlar. Judge Davies presided at the hearing.

Cotlar testified that he interviewed the complainant on April 20, 2006 (2 R.R. 14-15). He told her that her story about how she ended up in petitioner's truck did not make sense, that he did not believe her, and that he did not think that a jury would believe her (2 R.R. 15). When she persisted in her story, he said that he would probably have to dismiss the case unless he could explain to a jury why she was with petitioner (2 R.R. 15-16). She then admitted that she had previously smoked crack cocaine on a motorcycle

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[2] This information, which Cotlar provided without reviewing the notes of his interview with the complainant, proved to be incorrect.

[3] Cotlar asserted in an affidavit that he believed that the complainant used cocaine on the night in question (C.R. 157).

ride with petitioner while he drank whiskey; that she had previously pawned a ring to buy crack cocaine and that he retrieved it and returned it to her about three weeks before the night in question; and that there were at least two other occasions on which she had smoked crack cocaine in his presence (2 R.R. 16-17, 19). Cotlar made written notes of the interview (C.R. 146-47). He did not disclose the interview notes or their content to Junck, the probation officer, or the court (2 R.R. 22-23).[4] The complainant did not want to testify because it would destroy her marriage if her husband and children found out that she had used crack cocaine, had a relationship with petitioner, and accompanied him at 3:00 a.m. (2 R.R. 20-21).

Cotlar concluded after this conversation that petitioner should receive probation, but he could not obtain permission from his supervisors to offer it (2 R.R. 25). Instead of disclosing to Junck what the complainant told him, he said that he would not oppose probation if petitioner pled guilty without an agreed recommendation on punishment (2 R.R. 24). They met with Judge Wilkinson and reached a tacit understanding that petitioner probably would receive probation following a pre-sentence investigation

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[4] Cotlar did not feel obligated to disclose the interview notes pursuant to *Brady v. Maryland* even though Junck told him that petitioner maintained that the complainant was a "crackhead" (2 R.R. 23-24).

(2 R.R. 26-27).[5] Petitioner pled guilty on May 12, 2006, and the court recessed the proceedings for preparation of a PSR (C.R. 258-59).[6]

Cotlar skimmed the PSR before the sentencing hearing (2 R.R. 28-29). When he read that petitioner denied committing the offense, he told Junck that petitioner was going to prison (2 R.R. 32). The PSR contained the complainant's statements to the deputy and the probation officer but not her statements to Cotlar acknowledging that she had a relationship with petitioner that involved drugs (2 R.R. 29-31). Cotlar asserted that he did not read those portions of the PSR but that, if he had, he would have "cleared it up" and disclosed to the court what she told him (2 R.R. 30, 32-33).

Junck testified that Cotlar did not disclose the notes of his interview with the complainant or their content; had he done so, Junck would have made sure that the court knew about her statements prior to sentencing (3 R.R. 27-30).

Petitioner contended that the State's failure to disclose the complainant's statements to Cotlar and

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[5] Cotlar told Junck that petitioner would have to accept responsibility for the offense during the interview with the probation officer (2 R.R. 25-26).

[6] Cotlar wrote an email to habeas counsel that the plea without an agreed recommendation for deferred adjudication probation "was made with a wink and a nod" between Judge Wilkinson, Junck, and him (C.R. 145).

to correct her false and misleading statements in the PSR denied him due process of law. *See* U.S. CONST. amends. V and XIV. The state trial court concluded that the prosecution has no duty to disclose favorable evidence material to punishment, as *Brady v. Maryland* does not apply where the defendant pleads guilty in light of *United States v. Ruiz*.[7] The Court of Criminal Appeals denied relief without written order based on the trial court's findings of fact and conclusions of law. The state court decision constitutes an affront to *Brady* and its progeny.

Suppression by the prosecution of evidence favorable to the accused violates due process where the evidence "is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. at 87. Brady testified that he participated in the crime but that the co-defendant did the actual killing. The jury convicted and sentenced him to death. This Court ordered a new trial on punishment because the prosecution suppressed the co-defendant's statement that he did the killing. Thus, *Brady* expressly requires the prosecution to disclose favorable evidence material to punishment. *See United States v.*

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[7] Coincidentally, the day before the court entered the findings of fact and conclusions of law, two prosecutors in the Harris County District Attorney's Office published a paper entitled, "The State's Obligations Under *Brady v. Maryland*," for use in a training session. They acknowledge in the paper that prosecutors have a duty to disclose evidence that could be used to impeach a witness or mitigate the punishment (C.R. 254-57).

Weintraub, 871 F.2d 1257, 1264-65 (5th Cir. 1989) (new sentencing hearing required where prosecution suppressed evidence relevant to amount of narcotics sold); *United States v. Severson*, 3 F.3d 1005, 1012-13 (7th Cir. 1993) (new sentencing hearing required where prosecution suppressed evidence relevant to whether defendant accepted responsibility for offense).

Ruiz does not alter the application of *Brady* to evidence that mitigates the punishment where the defendant pleads guilty without an agreed recommendation on punishment. *Ruiz* held that a defendant's guilty plea is not rendered involuntary where the prosecution failed to disclose impeachment evidence relating to its informants and witnesses prior to entry of the plea. 536 U.S. at 633. It did not involve the suppression of evidence that would mitigate the punishment. Nor did this Court suggest that the prosecution is entitled to suppress evidence that would mitigate the punishment where the defendant pleads guilty without an agreed recommendation on punishment. Furthermore, two years after this Court decided *Ruiz*, it concluded that the suppression of evidence that a prosecution witness was a paid police informant adversely affected "the reliability of the jury's verdict regarding punishment." *Banks v. Dretke*, 540 U.S. 668, 703 (2004).

Ruiz did not overrule *Brady* and does not authorize the prosecution to suppress evidence material to punishment where the defendant pleads guilty without an agreed recommendation on punishment. It is

illogical and unfair to have a rule of law that, where one defendant pleads not guilty and the co-defendant pleads guilty, both are convicted, and the prosecution suppressed favorable evidence material to punishment, the defendant who pled not guilty is entitled to a new sentencing hearing but the co-defendant is not, simply because he pled guilty. The Court should grant certiorari to clarify that *Brady* prohibits the prosecution from suppressing favorable evidence material to punishment where the defendant pleads guilty without an agreed recommendation on punishment. SUP. CT. R. 10(a) and (c).

II. THE TEXAS COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT UNDISCLOSED EVIDENCE THAT WOULD HAVE IMPEACHED THE COMPLAINANT'S STATEMENTS CONTAINED IN THE PRE-SENTENCE REPORT IS NOT MATERIAL TO PUNISHMENT.

The state trial court further found and concluded that, even if *Brady* applied, Cotlar had no duty to disclose the complainant's prior inconsistent statements and use of crack cocaine, as this evidence "was not material at sentencing, would not have been admissible, and would not have mitigated punishment" (C.R. 240). This decision is totally unsupported by the evidence presented in the habeas proceeding. The complainant's statements to the deputy and the probation officer were included in the PSR. Had Cotlar disclosed her contradictory statements, Junck

would have informed the court to demonstrate the falsity of specific statements attributed to her in the PSR. "Admissibility" is not an issue where the court assesses punishment on the basis of a PSR. The ultimate issue is whether there is a reasonable probability that Judge Wilkinson would have assessed less than ten years had he known about this evidence. Judge Davies's conclusion that the undisclosed evidence was not mitigating is meaningless in view of the fact that she did not assess the punishment.

The prosecution has a duty to disclose favorable evidence, even if it was not requested or was requested only in a general way, if the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs*, 427 U.S. 97, 108 (1976). Regardless of any defense request, favorable evidence is material, and constitutional error results from its suppression by the prosecution, if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

A showing of materiality does not require the defendant to prove that the disclosure of the evidence or impeachment of the false statements would have resulted in a lesser sentence. The question is not whether the defendant probably would have received a different verdict, but whether he received a fair trial, understood as a trial resulting in a verdict

worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

The knowing use of false testimony by the prosecution violates due process. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). The prosecutor has a duty to correct false testimony that is relevant to the credibility of a witness. *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959). The defendant must show that the testimony was false, the prosecution knew it, and the testimony was material.

Conceptually, there is no difference between false testimony given at a sentencing hearing and false statements contained in a PSR. This Court has clearly held that it violates due process for the sentencer to assess punishment on the basis of materially false information. *Townsend v. Burke*, 334 U.S. at 740-41; *United States v. Tucker*, 404 U.S. 443, 447-48 (1972). It observed that Townsend "was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law. . . ." *Townsend*, 334 U.S. at 741.

Judge Wilkinson sentenced petitioner, a 63-year-old first offender who was eligible for probation, to ten years in prison on the basis of a PSR reflecting the complainant's assertion that they had a platonic relationship and she accompanied him either because he forced her into his truck (as she told a deputy that night) or because she had been drinking and trusted

him (as she later told the probation officer), and petitioner's assertion that she made a false accusation because she was smoking crack cocaine and got mad when he would not take her to buy drugs. Whether the complainant was smoking crack cocaine and asked petitioner to take her to buy drugs was material to sentencing. The complainant's statements to Cotlar demonstrate that she lied to the probation officer about the nature of her relationship with petitioner and that the PSR falsely represented that relationship. Nonetheless, Cotlar failed to disclose what she told him to Junck, the probation officer, or the court. The court sentenced petitioner to ten years in prison on the basis of false, incomplete, and misleading information in the PSR. There is a reasonable probability that it would have assessed less than ten years had it known about the complainant's statements to Cotlar, which tended to corroborate petitioner's statements to the deputy and the probation officer. Thus, the undisclosed evidence was material to punishment. The Court should grant certiorari to determine whether undisclosed evidence that would have impeached the complainant's statements contained in the PSR is material to punishment. SUP. CT. R. 10(a) and (c).

CONCLUSION

Petitioner requests that the Court grant the petition for a writ of certiorari, vacate the judgment, and order a new sentencing hearing.

Respectfully submitted,

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APPENDIX A

Cause No. 1047063-A

EX PARTE	§	IN THE 179TH
	§	DISTRICT COURT
JAMES HENRY MCELROY,	§	OF HARRIS COUNTY,
Applicant	§	TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Jul. 11, 2008)

This case is before the Court pursuant to James Henry McElroy's application for writ of habeas corpus under TEX. CODE CRIM. PROC. art. 11.07. McElroy, hereafter applicant, challenges his sexual assault conviction and claims he was denied the effective assistance of counsel and subjected to prosecutorial misconduct. The convicting court, presided over by the Honorable Carol Davies, on May 29 and 30, 2008, conducted an evidentiary hearing to resolve the allegations presented by applicant.

The Court, having considered testimony adduced during the evidentiary hearing, the official court documents and records in cause number 1047063 and 1047063-A, along with the applicable law, is of the opinion that applicant is not entitled to the relief he seeks. Applicant was not denied constitutionally effective assistance of counsel and was not subjected to prosecutorial misconduct. The Court recommends that relief be denied and makes the following findings of fact and conclusions of law.

I. PROCEDURAL HISTORY

The State charged applicant with sexually assaulting Tammy Siddique. Applicant pled guilty, the Community Supervisions and Corrections Department ("CSCD") prepared a pre-sentence investigation ("PSI") report, and the Court, in July 2006, assessed applicant's punishment at confinement in prison for ten years and a $5,000 fine. CSCD interviewed the victim, Siddique, while preparing the pre-sentence investigation. Siddique's statement to CSCD was inconsistent with the statement she had made to police some months before. The PSI report reflected both statements.

On April 9, 2007, applicant filed an application for writ of habeas corpus under TEX. CODE CRIM. PROC. art. 11.07. The convicting court conducted an evidentiary hearing to resolve applicant's claims on May 29, May 30, 2008. Kenneth Junck, who served as applicant's trial counsel, and Dorian Cotlar, who represented the State, testified about their, involvement in applicant's prosecution.

II. THE MERITS

The issues this Court is called upon to resolve are whether Junck's legal representation denied applicant constitutionally effective assistance of counsel during his trial, *see Strickland v. Washington,* 466 U.S. 668, 687 (1984), and whether the prosecutor engaged in misconduct by failing to disclose favorable evidence. *See Brady v. Maryland,* 373 U.S. 83 (1963).

A. The standard of review concerning ineffective assistance claims

This Court will employ the standard of review for evaluating claims of ineffective assistance of counsel is set forth in the familiar *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the *Strickland* two-pronged standard, applicant must demonstrate: (1) his trial counsel's performance was deficient, because it fell below an objective standard of reasonableness; and (2) there was a reasonable probability that, but for counsel's performance, the proceedings' result would have differed. *Strickland,* 466 U.S. 668. That is to say, defense counsel was not functioning as "counsel," guaranteed by the Constitution and that counsel's deficient performance prejudiced the defense. *Id.*; *Valencia v. State,* 946 S.W.2d 81, 83 (Tex. Crim. App. 1997); *Rodriguez v. State,* 899 S.W.2d 658, 664 (Tex. Crim. App. 1995). Moreover, whether, the *Strickland* test has been met is to be judged by the totality of the representation, not by isolated acts or omissions. *Rodriguez,* 899 S.W.2d at 665.

B. Trial counsel rendered effective assistance of counsel

The Court believes, based on the record, that Junck was sufficiently prepared and sufficiently advised applicant. Applicant retained Junck to represent him in this case, and Junck had represented applicant in another sexual assault case. Junck had a good working relationship with applicant and enjoyed free and open communication with him. Applicant

appeared in court with Junck on at least five occasions before pleading guilty plea, and while applicant was free on bond, he met with Junck in Junck's office on at least two occasions. Further, Junck spoke with applicant several times by phone. Junck discussed, the facts of the case, including Siddique's allegations, on numerous occasions with applicant, and Junck investigated the case and interviewed witnesses suggested by applicant.

Applicant told Junck he did not want to go to trial and asked Junck negotiate a plea-bargained agreement with the State. Toward that end, Junck met with prosecutor Cotlar. Cotlar told Junck he would not agree to probation, but suggested that applicant could plead guilty to the Court without an agreed recommendation as to punishment, subject to a PSI, and that the trial court could possibly sentence the applicant to deferred adjudication probation. Junck discussed this option with applicant, and applicant ultimately decided to plead guilty to the Court without an agreed recommendation as to punishment, subject to a PSI, and have the court assess punishment. Junck told applicant about the PSI process and told him that he needed to tell the truth in the PSI interview and accept responsibility for sexually assaulting Siddique. Junck believed that applicant would accept responsibility for sexually assaulting Siddique and did not accompany applicant to the PSI interview.

The Court believes Junck's advice to applicant regarding applicant's decision to plead guilty and

Junck's decision not to accompany applicant to his PSI interview were reasonable. The Court is of the opinion that applicant understood the nature of his plea and the PSI process, and Junck properly admonished applicant as to the consequences of his decision to plead guilty. Applicant understood his right to trial, and he freely, knowingly and voluntarily waived that right. Moreover, Junck never told applicant that the only way he could get probation was to plead guilty to the Court. The Court concludes Junck provided applicant with a rational and factual understanding of his chances of receiving probation.

C. The applicant's burden concerning prosecutorial misconduct claims based on *Brady*

In *Brady v. Maryland,* the Supreme Court created what amounts to a federal constitutional right to certain minimal discovery." 42 George E. Dix & Robert O. Dawson, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 22.21, and the Court of Criminal Appeals has interpreted article I, section 19 of the Texas Constitution to give a defendant the same rights he enjoys under *Brady* and its progeny. *See Ex parte Adams,* 768 S.W.2d 281, 293 (Tex. Crim. App. 1989).

To invoke *Brady*, a defendant must present evidence that: (1) the prosecution suppressed or withheld evidence; (2) the evidence would have been favorable to the accused; and (3) this evidence would

have been material to the defendant's defense. *Cruz v. State,* 838 S.W.2d 682, 686 (Tex. App.-Houston [14th Dist.] 1992, pet. ref'd) (*citing Moore v. Illinois,* 408 U.S. 786, 794-95 (1972)). The defendant has the burden of showing that, in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure. *Hampton v. State,* 86 S.W.3d 603, 612 (Tex. Crim. App. 2002).

Further, the Supreme Court has held that *Brady* does not apply to a guilty plea. *See United States v. Ruiz,* 536 U.S. 622 (2002).

D. The applicant was not subjected to prosecutorial misconduct.

Applicant claims the prosecutor engaged in misconduct by not disclosing to Junck that Siddique had made inconsistent statements to him and admitted to using drugs in the past. The Court finds applicant's prosecutorial misconduct claims unpersuasive.

1. *Brady* did not apply to applicant's PSI hearing because applicant waived his right to a trial and pled guilty.

A defendant who pleads guilty is not entitled to the same kinds of due process protections with, regard to evidence disclosure as someone who demands a contested trial. *See United States v. Ruiz,* 536 U.S. 622, 630 (2002) ("this Court has found that

the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor"). By pleading "guilty," a defendant waives his right to a contested trial, although the trial court might permit evidence contesting guilt in its discretion.

Because applicant pled guilty to the allegations in the indictment, that he sexually assaulted Siddique, he waived his right to a contested trial and *Brady* should not apply. The Court concludes that *Brady* imposed no duty on the prosecutor to disclose Siddique's inconsistent statements or admitted drug-usage history.

2. Even if *Brady* applied, the prosecutor had no duty to disclose Siddique's inconsistent statements and drug-usage history.

Siddique told Cotlar that she'd known applicant prior to the sexual assault and that she'd used drugs in the past. Siddique had never denied using drugs to anyone involved in the sexual assault's investigation and never admitted to using drugs on the night of the sexual assault. Cotlar did not tell Junck about his conversation with Siddique before the PSI hearing; he did not believe that Siddique's admission to smoking

crack cocaine in applicant's presence on prior occasions constituted favorable evidence that he was obligated to disclose to Junck. Cotlar did not believe Siddique's drug-usage history was relevant to the sexual assault. The Court is of the opinion that Siddique's drug-usage history was not material at sentencing, would not have been admissible, and would not have mitigated punishment.

In her statement to police, which was included in the PSI report, Siddique told police applicant had forced her into his truck before sexually assaulting her. Siddique's subsequent statement to the PSI interviewer was inconsistent with the statement she'd given police. The PSI report indicates Siddique acknowledged that she'd been drinking alcohol before the sexual assault, and that she accompanied applicant willingly because she trusted him. The Court believes this inconsistency was not material and would not have mitigated punishment. Furthermore, the inconsistency was contained in the PSI Report, which was considered by the Court and provided to Junck prior to sentencing.

The inconsistencies in Siddique's statements are apparent from a plain reading of the PSI report and do not constitute favorable evidence that the prosecutor was obligated to disclose to the defense assuming *arguendo* he had a duty under *Brady*.

III. CONCLUSION

Applicant has not met his burden of proving by a preponderance of the evidence that he was denied the effective assistance of counsel. The Court reaches this conclusion after having evaluated the record and all the pleadings before it. The Court believes applicant was afforded constitutionally effective representation and that counsel's actions and/or inactions were objectively reasonable.

Junck did not allow applicant to plead guilty knowing that applicant would assert his innocence or that applicant would not accept responsibility for committing the offense. Junck's decision not to accompany applicant to the PSI interview was reasonable and was not deficient conduct.

In light of the foregoing, applicant has failed to show that Junck's actions were not based on sound trial strategy or that, by a preponderance of the evidence, there is a reasonable probability that the proceeding's result would have been different but for Junck's conduct. The totality of Junck's representation was constitutionally sufficient.

Additionally, the prosecutor had no duty under *Brady* to disclose evidence because applicant pled guilty. Assuming *arguendo* that *Brady* did apply, applicant has not met his burden of showing that the prosecutor withheld favorable and material evidence. Siddique's undisclosed drug-usage and relationship with applicant did not impact the sentence assessed. Further, the drug-usage and relationship

with applicant were apparent from the PSI report, which was made available to applicant and was reviewed by the Court prior to sentencing.

Because the totality of Junck's representation was constitutionally sufficient, and the prosecutor did not engage in misconduct, applicant was afforded a fair trial. Accordingly, the Court recommends relief be denied.

SIGNED this 11 day of July, 2008.

/s/ Carol Davies
CAROL DAVIES
Judge, 179th District Court
Harris County, TEXAS

[SEAL]

Cause No. 1047063-A

EX PARTE	§	IN THE 179TH
	§	DISTRICT COURT
JAMES HENRY MCELROY,	§	OF HARRIS COUNTY,
Applicant	§	TEXAS

ORDER

(Filed Jul. 11, 2008)

The Court **ORDERS** the clerk to prepare a transcript of all papers in cause number 1047063-A and transmit the transcript to the Court of Criminal Appeals as provided by TEX. CODE CRIM. PROC. ANN. art. 11.07 § 3. The transcript shall include certified copies of the following documents:

A. the original and supplemental applications for writ of habeas corpus, together with all attachments;

B. the Respondent's original answer;

C. the affidavits and exhibits filed herein;

D. the Court's order;

E. the appellate record in cause number 1047063;

F. the Court's Findings of Fact and Conclusions of Law; and

G. the respondent's and the applicant's Proposed Findings of Fact and Conclusions of Law.

The Court further **ORDERS** the clerk to send a copy of this order to the applicant and to the State.

Signed on this 11 day of July, 2008.

/s/ Carol Davies
CAROL DAVIES
Judge, 179th District Court
Harris County, TEXAS

[SEAL]

APPENDIX B

[SEAL] TEXAS COURT OF CRIMINAL APPEALS

Case # WR-70,481-01 -> Event: ACTION TAKEN

Event Information:

Event Type:	ACTION TAKEN
Description:	Application for Writ of Habeas Corpus – 11.07
Date:	10/8/2008
Disposition:	HC denied W/O written order on TC Fndgs-with Hear

Opinion Written:

Supreme Court, U.S.
FILED
MAR 2 3 2009
OFFICE OF THE CLERK

No. 08-712

In The
Supreme Court of the United States

JAMES HENRY McELROY,
Petitioner,

vs.

STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

Respondent objects to the Petitioners' Questions Presented on the ground that they assume certain procedural, legal, and factual premises that are demonstrably unfounded, as established more fully in this brief.

Respondent suggests instead the following Questions Presented:

1. Should the Court review Petitioner's claim that the state court improperly invoked *United States v. Ruiz*, 536 U.S. 622 (2002), to narrow application of *Brady v. Maryland*, 373 U.S. 83 (1963), where as a legal and factual matter, Petitioner has failed even to demonstrate a *Brady* violation?

2. Whether the prosecutor's failure to disclose certain evidence constituted a violation of *Brady*?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

JURISDICTION 2

STATEMENT OF THE CASE 2

I. Facts of the Crime 2

A. The victim's description of McElroy's sexual assault. 2

B. McElroy's pleads guilty and then denies the sexual assault. 4

C. McElroy suggests the existence of an inconsistency, based upon the "false testimony" of T.S., where there is none. 5

II. Conviction and Procedural History 7

REASONS FOR DENYING THE WRIT 8

I. The Questions Presented for Review Premature. 8

II. The Court Should Not Grant Certiorari to Review Because the Petitioner's Questions Presented are Barred by *Teague v. Lane.* 9

III. The Court Should Not Grant Certiorari to Review the Questions Presented Because They Involve Primarily Fact Intensive Questions of Evidence and State Sentencing Procedure. 10

IV. Whether or Not the State Court Actually Held that McElroy Waived his Right to Prospective *Brady* protections After He Entered His Guilty Plea, McElroy's Argument is Without Merit, Because He was Not Entitled to *Brady* Protection in the Present Circumstance. 11

A. McElroy cannot establish a *Brady* violation because he was already aware of the information contained in the Notes, and failed to utilize that information at sentencing. 13

B. Because McElroy apparently has never reconfirmed that he sexually assaulted T.S., he cannot demonstrate materiality. 15

C. McElroy has not established a *Brady* violation because he does not even suggest –let alone argue–that the evidence of T.S.'s drug use would have been admissible at sentencing. 17

V. This Court Should Not Review an Ambiguous, Unpublished State Court Determination That Has No Precedential Value. 19

A. The State court determination regarding the application of *United States v. Ruiz*, to McElroy's *Brady* claim is ambiguous. 19

B. The State court determination included an alternative basis to affirm McElroy's conviction. 20

C. The Texas Court of Criminal Appeals' single sentence denial of McElroy's claim–which included an alternative basis to deny relief–is not important enough to warrant review. 20

CONCLUSION 21

TABLE OF AUTHORITIES

Cases	Page
Adams v. Robertson, 520 U.S. 83 (1997)	15
Brady v. Maryland, 373 U.S. 83 (1963)	Passim
Clark v. State, 270 S.W.3d 573 (Tex. Crim. App. 2008)	21
Danforth v. Minnesota, 128 S. Ct. 1029 (2008)	9
Gray v. Netherland, 518 U.S. 152 (1996)	12
Kyles v. Whitley, 498 U.S. 931 (1990)	9
Nguyen v. State, 222 S.W.3d 537 (Tex. App.– Houston [14th Dist.] 2007)	14
Penry v. Lynaugh, 492 U.S. 302 (1989)	10
Ross v. Moffitt, 417 U.S. 600 (1974)	11
Teague v. Lane, 489 U.S. 288 (1989)	9
United States v. Agurs, 427 U.S. 97 (1976)	12, 13
United States v. Bagley, 473 U.S. 667 (1985)	12,13,18
United States v. Ruiz, 536 U.S. 622 (2002)	i, 1, 19, 21
Wood v. Bartholomew, 516 U.S. 1 (1995)	18

TABLE OF AUTHORITIES, continued

Page

Statutes and Rules

28 U.S.C. § 1257(a) 2

28 U.S.C. § 2254 9

SUP. CT. RULE 10 . . . . . 8, 11

TEX. R. APP. P. 26.2 (a)(1) 9

Tex. R. Evid. 613(c) 14, 19

Petitioner James Henry McElroy ("McElroy")[1] was properly convicted and sentenced in Harris County, Texas, for a brutal sexual assault to which he pled guilty and entered a judicial confession. In the instant petition for certiorari review of the state court's denial of *state* habeas relief, McElroy argues that he was unconstitutionally deprived of the protections of *Brady v. Maryland*, 373 U.S. 83 (1963), because the state court held that the protections described therein were waived after he pled guilty. Pet. Cert. at 6-14.[2] McElroy also argues that the state court improperly determined the evidence supporting his *Brady* claim was not material; and hence, that—even if *Brady* fully applied after McElroy entered his guilty plea—the state court erred when it held that there was no *Brady* violation. Pet. Cert. at 14-17.

However, and as will be established below, the Court should not address McElroy's broad constitutional claim under *United States v. Ruiz*, 536 U.S. 622 (2002), because even assuming *Brady*'s full applicability, McElroy fails to demonstrate a violation of *Brady*, in the present circumstance. Further, McElroy has a federal habeas petition pending in the United States District Court for the Southern District of Texas (Houston Division), which contains the very same issues presented here. Thus, certiorari review should be denied.

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[1] Respondent State of Texas will be referred to as "the State."

[2] Unless otherwise noted, all references to "Pet. Cert." and "Pet. Cert. App." are to the petition and appendix filed in No. 08-712.

JURISDICTION

The order of the Texas Court of Criminal Appeals, denying McElroy's state habeas application, was entered on October 8, 2008. The petition for writ of certiorari was filed on November 26, 2008. This Court has jurisdiction under the provisions of 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

I. Facts of the Crime

A. The victim's description of McElroy's sexual assault.

The evidence supporting the underlying conviction is based upon (i) T.S's[3] statement's to police, (ii) T.S.'s statements to a probation officer for preparation of a pre-sentence report ("PSR"), and (iii) McElroy's guilty plea and judicial confession. SHCR, at 42–50.[4] T.S. met McElroy in May of 2005, when she was watering her lawn and he stopped his motorcycle in front of her house. She next saw him in October 2005, when McElroy came to her house to ask her if she was selling her automobile. T.S. gave McElroy a piece of paper containing the names of both her and her husband, and her telephone number. Several days later, McElroy called T.S. and asked her to look outside her house so that he could "see her pretty

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[3] Although the victim's name is already part of the record on appeal, the State will refer to her by her initials, "T.S."

[4] "SHCR" refers to the clerk's record for McElroy's state habeas petition, specifically: *Ex parte McElroy*, No. 70,481-01, EventID 2340363. The "EventID" is located on the scanning cover sheet of each volume.

face." They spoke on the telephone about her automobile and other subjects before McElroy left. McElroy began calling T.S. more regularly to speak with her. By happenstance, T.S. next saw McElroy on November 5, 2005, at a bar, which she visited to meet another friend.

In the early morning hours of November 13, 2005, T.S. was awake at home. Her husband and son were asleep. She called McElroy earlier that night, and he called her at approximately 3 a.m., telling her that he was going to bring her and her husband a bottle of tequila because he was leaving town early the next morning. T.S. met McElroy outside of her house at approximately 3:20 a.m. McElroy told her that, since he had brought her something to drink, she should talk to him. McElroy grabbed her arm and told her to get into his truck. T.S. explained that she normally would not leave her house so late at night, but she had consumed a few drinks, and she trusted McElroy. McElroy told T.S. that he needed to go to a grocery store to purchase medicine for his girlfriend.

While driving, McElroy asked T.S. if she wanted to visit an old abandoned military property nearby where a "lot of bodies were buried." T.S. declined the offer. T.S. believed that McElroy would take her home after he finished his errand at the grocery store. However, when he returned from inside the store, McElroy became violent. McElroy drove to a darkened area, grabbed T.S.'s hair and pulled her down to his lap, forcing her to perform oral sex on him. McElroy removed T.S.'s dress, and shouted at her to "suck his penis." McElroy then pulled her head up by the hair and began twisting her nipples extremely hard, causing her pain. During the ordeal, McElroy held T.S. by her hair, with her head across the center console of the truck and her knees in the

passenger seat. McElroy inserted an unknown object into T.S's vagina, then attempted to penetrate her anus, but ceased this attempt because of T.S.'s screaming. During the sexual assault, McElroy threatened her with handcuffs. After approximately two hours, T.S. eventually broke free of McElroy's control, and attempted to get out of the truck through the driver's side window. McElroy opened the door to try to force her back into the truck and under his control. However, T.S. managed to escape, and ran to a neighbor's house to call the police.

The police arrived at the neighbor's home and observed T.S. wearing only a pink robe. They observed bruising on her left arm, above both of her breasts, and on the left side of her head. She was very upset and did not appear to be under the influence of drugs or alcohol.

B. McElroy's pleads guilty and then denies the sexual assault.

The only evidence supporting McElroy's version of events is (i) his guilty plea and judicial confession, and (ii) his statements to the probation officer—after his guilty plea—for preparation of the PSR. Importantly, McElroy's guilty plea and judicial confession are *consistent* with T.S.'s statements. In his written judicial confession, entered on May 12, 2006, McElroy swore under oath that:

> [O]n or about NOVEMBER 12, 2005, [McElroy] did then and there unlawfully, intentionally and knowingly cause the penetration of the mouth of [T.S.], hereinafter called the Complainant, by the sexual organ of the Defendant, without the consent of Complainant, namely the

> Defendant compelled the Complainant to submit and participate by the use of physical force and violence.

SHCR, at 258.

However, after entering his guilty plea, McElroy gave a statement to the probation officer for preparation of the PSR in which he denied the sexual assault, claiming that he found T.S. walking the streets early in the morning of November 12, 2005. SHCR, at 48–49. McElroy claimed that T.S. was in possession of a crack pipe, and he asked her if she needed a ride home. He claims that she got into his automobile. McElroy claimed that T.S. asked for money, and told him to take her to purchase drugs. McElroy contends that when he refused, she took off her clothes and jumped out of the truck. McElroy told the probation officer that he believed T.S. fabricated the accusation because she was afraid her husband would discover she was out late, and "needed an excuse."[5]

C. McElroy suggests the existence of an inconsistency, based upon the "false testimony" of T.S., where there is none.

McElroy's principle legal argument is grounded upon a highly dubious factual contention. McElroy suggests that T.S. made "false and misleading statements

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[5] McElroy's statement to the probation officer was largely consistent with his statement to police made prior to his initial arrest, accept that he added that he observed T.S. "toss something away" when he approached her in his automobile. SHCR, at 42–44, 47–48.

in the PSR." Pet. Cert. at 12. In an effort to support this assertion, McElroy cites a statement that T.S. made in an interview with the prosecutor. *Id.* at 16–17. The statement to the prosecutor was made after she made her statements to the police, but before her statements were given to the probation officer for preparation of the PSR. *Id.* at 11. These statements were described in two pages of handwritten notes taken by the prosecutor ("Notes").

However, T.S.'s statements to the prosecutor—as reflected in the Notes—do not *contradict* her statements made for the preparation of the PSR. The Notes reflect that the only information contained therein that was not ultimately part of the PSR was that T.S. "had a relationship with the petitioner that involved drugs." 2 RR 16–20; Pet. Cert. at 11. Despite McElroy's vague suggestions to the contrary, T.S. did *not* tell the prosecutor that she used drugs the night of the sexual assault, or that she asked McElroy to purchase drugs for her that night.[6]

Thus, at least two of the alleged "inconsistencies" between the Notes and T.S.'s other statements do not exist. Specifically, McElroy contends that: "Whether the complainant was smoking crack cocaine, and asked petitioner to take her to buy drugs was material to sentencing." Pet. Cert. at 17. While this argument is not unreasonable—at least in the abstract—the Notes do *not* support McElroy's allegations that the morning of the sexual assault, T.S. was smoking crack cocaine, or that

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[6] During the live hearing, habeas counsel repeatedly attempted to get the prosecutor to admit that T.S. told him she "smoked crack" on the night of the sexual assault, but the prosecutor stated she did not. 2 RR 16–20.

she asked him to purchase drugs. 2 RR 16–20. The "evidence" in support of this contention comes from McElroy's own statements, not from the Notes. *See* SHCR, at 43–44. Second, to the extent that the Notes suggested that T.S. voluntarily got into McElroy's car, T.S.'s testimony in the PSR confirmed this. SHCR, at 49–50.

Controlling here, McElroy cites no portion of the record suggesting that T.S. was ever directly asked about a relationship with McElroy that involved drug use, or that she ever *denied* this drug-relationship in response to any question.

II. Conviction and Procedural History.

McElroy was arrested and confined pursuant to a judgment and sentence of the 179th District Court of Harris County, Texas, in cause number 1047063. SHCR, at 270–71. McElroy pled guilty, and entered a judicial confession to the second-degree felony offense of sexual assault, for which he faced a sentencing range of no less than two-years and no more than twenty-years in prison. *Id.* at 258–65. The guilty plea was entered without a recommendation as to sentence, and in anticipation of the preparation of a PSR. *Id.* at 259.

After his voluntary and knowing guilty plea to this sexual assault, and after entering a judicial confession thereto, McElroy provided a statement as part of the PSR, in which he *denied* that he committed the sexual assault. SHCR, at 48–49. McElroy claimed that T.S. fabricated the entire story when he refused to purchase drugs for her. *Id.* On June 14, 2006, the trial court sentenced McElroy to ten-years in prison (the middle of

the sentencing range), no doubt due in some measure to McElroy's refusal to accept responsibility for his crime. McElroy did not appeal his conviction. SHCR, at 270–71; Pet. Cert. at 5.

On April 9, 2007, and with the assistance of counsel, McElroy filed a state application for the writ of habeas corpus with the Texas Court of Criminal Appeals. SHCR, at 2. The trial court conducted a contested, live, evidentiary hearing to consider McElroy's state habeas claims. After that hearing, the trial court entered written findings of fact and conclusions of law, and recommended that the state habeas application be denied. Pet. Cert. App A; SHCR, at 237–42. On October 8, 2008, the Texas Court of Criminal Appeals denied McElroy's state habeas application without written order, on the findings of the trial court with a hearing. SHCR, at cover.

REASONS FOR DENYING THE WRIT

I. The Questions Presented for Review Premature.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. *See* Sup. Ct. Rule 10. McElroy advances no special or important reason in this case, and none exists. Certiorari review of state habeas decisions is inappropriate where a claim is ripe for federal habeas review. As Justice Stevens once noted:

> [T]his Court rarely grants review at this stage of the litigation even when the application for state collateral relief is

> supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J. concurring). Indeed, on November 20, 2008, McElroy filed a federal petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising the same cleaims raised herein. *See McElroy v. Quarterman*, No. 4:08-CV-3446 (S.D. Tex.). Thus, it appears that "the more appropriate avenue" is now available for the litigation of the instant claims.

II. The Court Should Not Grant Certiorari to Review Because the Petitioner's Questions Presented are Barred by *Teague v. Lane*.

McElroy did not file a direct appeal of this conviction and sentence; hence, it became final thirty-days after the judgment and sentence were entered, *i.e.*, on August 14, 2006. *See* TEX. R. APP. P. 26.2 (a)(1) (defining the time to perfect an appeal). Thus, the State's interest in finality outweighs McElroy's interest in the retroactive application of any new rule of constitutional law. *Teague v. Lane*, 489 U.S. 288, 309–10 (1989) (plurality opinion); *see also Danforth v. Minnesota*, 128 S. Ct. 1029, 1040 (2008) (confirming that the principle in *Teague* regarding collateral review of a final state conviction still reflects prudential considerations like comity and finality).

McElroy cites no case of this Court extending *Brady* like obligations to the preparation of a PSR. While T.S. may have decided that she would not volunteer her participation in certain embarrassing and possibly criminal acts to the police or the probation officer (*i.e.*, her apparent drug use), McElroy has not demonstrated that she provided an affirmative misrepresentation of fact in response to any question. McElroy suggests that a prosecutor must provide evidence that might be used to impeach the material misstatements of a witness, where that witness has neither made such misstatements, nor been examined by either the prosecutor or the defense in a criminal proceeding. Because such an argument relies on the creation of a retroactive rule of constitutional law to be applied after a state conviction has become final, the Court should not grant certiorari on such a basis. *See* Section I, *supra*.

Because a grant of certiorari review in this Court would have the same impact upon the finality of McElroy's conviction and sentence, the Court is bound to consider the issues raised only in light of clearly established constitutional principles dictated by precedent as of August 14, 2006. *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989). With this in mind, it is clear that McElroy's Petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction.

III. The Court Should Not Grant Certiorari to Review the Questions Presented Because They Involve Primarily Fact Intensive Questions of Evidence and State Sentencing Procedure.

As the State will establish in detail below, to reach McElroy's Questions Presented, the Court would first

have to review and reject certain state court determinations regarding both the admissibility of T.S.'s drug use at sentencing, and whether such evidence was mitigating—both determinations made under *state* evidentiary procedure.

In addition, as the State will establish in detail below, McElroy has failed to demonstrate that any non-disclosed evidence was "material" for purposes of *Brady v. Maryland*. Thus, even if the Court addressed McElroy's first issue, the *Brady* claim would ultimately be denied.

Finally—with respect to "materiality"—this Court will not ordinarily grant a petition for the writ of certiorari based upon a petitioner's assertion that a court misapplied a properly stated rule of law. SUP. CT. RULE 10; *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) (Renquist, J.) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."). Given the peculiar nature of this case, a review of "materiality" will have almost no application beyond McElroy. Materiality in this petition is not sufficiently important to warrant this Court's review.

IV. Whether or Not the State Court Actually Held that McElroy Waived his Right to Prospective *Brady* protections After He Entered His Guilty Plea, McElroy's Argument is Without Merit, Because He Was Not Entitled to *Brady* Protection in the Present Circumstance.

McElroy completely fails to state a claim in support of his *Brady* allegation. The Court in *Brady v. Maryland*,

held that the suppression by the prosecution of evidence favorable to an accused, after a request, violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady*, 373 U.S. at 87. This duty to provide favorable evidence also includes impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

The state's obligation to disclose favorable information extends only to information that is *material*. *See Bagley*, 473 U.S. at 674-75. "[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial . . . ." *Id.* at 675 (footnote omitted); *cf.. Gray v. Netherland*, 518 U.S. 152, 168-70 (1996) (holding that a capital defendant was not entitled to creation of a "notice of evidence rule").

An earlier argument that the materiality test should be defined in terms of the defendant's ability to formulate defense strategies was explicitly rejected by the Court in *United States v. Agurs*, 427 U.S. 97 (1976). As the Court explained, to base the materiality requirement on the effect of the undisclosed information on a defendant's ability to prepare for trial would be unacceptable in part because such a standard would "necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense." *Id.* at 112 n.20. Because the state's duty extends only to exculpatory information, defining the materiality requirement in terms of defense strategies

would be at odds with the scope and purpose of the *Brady*

"The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Agurs*, 427 U.S. at 109-10. Instead, evidence is material "only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

A. McElroy cannot establish a *Brady* violation because he was already aware of the information contained in the Notes, and failed to utilize that information at sentencing.

Although not explicitly stated in his petition, McElroy suggests that the reason trial counsel did not raise T.S.'s drug use with the trial court (during sentencing), was that he was not aware of that information. *See* Pet. Cert. at 11 (where McElroy suggests that had the prosecutor turned over the Notes, trial counsel "would have made sure that the court knew about her statements prior to sentencing."). This suggestion is wholly contradicted by the record. Obviously, if T.S. used drugs in McElroy's presence, such information was necessarily known to McElroy. Indeed, we know that trial counsel relayed McElroy's complaint that T.S. was a "crack-head" prior to sentencing. *See* Pet. Cert. at 10 n.4 (suggesting that trial counsel told the prosecutor that McElroy considered T.S. a "crack-head" prior to the prosecutor's decision not to disclose the

Notes). Further, a cursory review of McElroy's statement to police would have put trial counsel on notice that McElroy claimed T.S. was using drugs the night of the sexual assault. *See* SHCR, at 43–44.

McElroy's essential complaint is *not* that he was unaware of the evidence suggesting T.S.'s drug use, but rather, that he did not know that the prosecutor knew of such evidence. But McElroy fails to establish materiality: he fails to provide any legal argument suggesting the prosecutor must provide documentary evidence, when the material basis of such evidence is already in the possession of the defendant; at least until a witness testifies in a manner in which the evidence could be used to impeach that witness.

McElroy's petition fails because trial counsel never made any effort to question T.S. about her drug use at sentencing. Stated differently, if T.S.'s drug use was so obviously mitigating, then why did trial counsel neglect to object to the PSR and expand the record at sentencing to include that drug use? Indeed, if trial counsel had objected to the PSR, claiming that it did not include evidence of T.S.'s drug use, then trial counsel could have moved the trial court to permit him to call T.S. as a witness, and examine her about her drug history with McElroy. *See Nguyen v. State*, 222 S.W.3d 537, 541 (Tex. App.–Houston [14th Dist.] 2007) (demonstrating that a defendant can object to a PSR if it fails to include all relevant sentencing information). Only if T.S. then *denied* that drug use, or testified in a manner inconsistent with the Notes, would the Notes have been admissible and would McElroy have been entitled to production of the Notes under *Brady*. *See* Tex. R. Evid. 613(c) ("A prior statement of a witness which is consistent

with the testimony of the witness is inadmissible except as provided in 801(e)(1)(B).").

McElroy's complaint would be better directed to the ineffective assistance of trial counsel for failing to pursue and develop T.S.'s drug use at sentencing. However, because McElroy never made this argument below, the Court should not now address it.[7]

B. Because McElroy apparently has never re-confirmed that he sexually assaulted T.S., he cannot demonstrate materiality.

After pleading guilty, McElroy gave a statement to the probation officer in which he completely contradicted both T.S., and the legal and factual basis of his guilty plea. SHCR, at 48–49. During the state habeas proceeding McElroy presumably had an opportunity to testify, and specifically to provide the state court with a *context* upon which to evaluate his *Brady* claim for materiality; which he failed to do. 1 RR 3. For instance, in the present petition, McElroy may be suggesting that T.S. is untruthful: McElroy may now concede that he sexually assaulted T.S., but that her brutal description of the rape should not be believed, because she did not independently volunteer her history of drug-use. Or perhaps McElroy now contends that T.S. took drugs the night of the sexual assault—a claim which the purported *Brady* material does not directly support—and that her

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[7] *Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("With very rare exceptions," the Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.").

drug use resulted in an exaggerated description of the attack.[8]

Under either conception, however, neither this Court nor the state court has a factual basis upon which to judge the materiality of the Notes. Because McElroy failed to describe the attack in the state habeas proceeding—and because he apparently has never *recanted* his later denial—the Court is forced to speculate about the specific manner in which T.S.'s drug related statements would have altered the likely sentence.

Stated differently, by failing to describe the circumstances of the sexual assault to which he pled guilty, McElroy is forcing the Court to speculate regarding the relationship between his ambiguous mitigation claim, and T.S.'s apparent drug use. Only where McElroy both concedes that he committed the crime, and provides a factual description of the events surrounding the rape, can a court determine the context in which T.S.'s drug use may have been relevant to mitigation. The State contends that consideration of such an argument—especially where the petitioner has denied that he committed a crime to which he has pled guilty—is not a appropriate use of the Court's scarce resources.

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[8] Although McElroy suggests that the evidence would have mitigated his sentence because T.S. was a "crack-head," *see* Pet. Cert. at 10 n.4, he does not directly adopt the highly dubious proposition that McElroy was morally deserving of a lesser sentence for a brutal sexual assault, merely because the victim was a drug user. Equally troubling is McElroy's suggestion that his relationship with T.S. was not "platonic," and that this information if disclosed to the trial court, would have somehow resulted in a lesser sentence for a brutal sexual assault. Pet. Cert. at 16–17.

C. McElroy has not established a *Brady* violation because he does not even suggest—let alone argue—that the evidence of T.S.'s drug use would have been admissible at sentencing.

The state court held that evidence of T.S.'s drug use was neither admissible nor material to sentencing. SHCR, at 240. It is crucial to place this legal determination into the context of McElroy's arguments below. Like the present petition, in his state habeas application McElroy failed to suggest anything but a vague relationship between the failure to disclose the Notes and his ultimate sentence. SHCR, at 14. Indeed, the state court apparently construed the bulk of McElroy's *Brady* argument as relating to his guilt. *See* SHCR, at 240 ("By pleading 'guilty,' a defendant waives his right to a contested trial, although the trial court might permit *evidence contesting guilt* in its discretion.") (emphasis added).

To reach McElroy's Questions Presented, the Court would first have to review and reject the state court determination regarding both the admissibility of T.S.'s drug use at sentencing, and whether such evidence was mitigating—both determinations made under *state* evidentiary procedure. McElroy fails even to acknowledge, much less address, the admissibility or relevance of the Notes under state procedure; rather, McElroy restates his ambiguous premise that the evidence was admissible to sentencing,[9] and that it was

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[9] Indeed the entirety of McElroy's argument regarding the state court determination that the evidence was inadmissable (continued...)

mitigating.[10] Thus, McElroy apparently asks the Court to reverse the state court determination regarding both admissibility and mitigating effect under state law, or to hold that such evidence is nevertheless material under the federal constitution, a doubtful proposition. *See Bagley*, 475 U.S. at 676 (requiring a reasonable probability that use of the evidence would result in an acquittal).

Indeed, McElroy's suggestion that *Brady* requires disclosure of irrelevant and inadmissible evidence has been already been rejected by the Court. *See Wood v. Bartholomew*, 516 U.S. 1, 6–7 (1995) (state's failure to disclose that witness had failed polygraph test did not deprive defendant of "material" evidence under *Brady*, in light of inadmissibility of polygraph results under Washington law, even for impeachment purposes).

In order for T.S.'s drug use—as that drug use is reflected in the Notes—to have been admissible to impeach T.S. at sentencing, McElroy would have to establish that he would have been permitted to ask T.S.

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[9](...continued)
appears to be the founded upon a single-sentence, and unsupported legal conclusion: "'Admissibility' is not an issue where the court assesses punishment on the basis of a PSR." Pet. Cert. at 15.

[10] The entirety of McElroy's argument addressing the state court determination that the evidence of drug use was not mitigating is another single-sentence, and an unsupported legal conclusion: "Judge Davie's conclusion that the undisclosed evidence was not mitigating is meaningless in view of the fact that she did not assess punishment." Pet. Cert. at 15. Bizarrely, McElroy's argument applies with equal vigor to this Court, and McElroy does not explain how the Court could reverse the state court mitigation determination where the Court did not itself "assess punishment."

about her drug use during sentencing.[11] McElroy simply fails to make this argument, except to ambiguously assert that the evidence was relevant to sentencing. And if T.S. had confirmed that drug use, McElroy would not have been permitted to introduce her previous statement contained in the Notes. *See* Tex. R. Evid. 613(c).

V. This Court Should Not Review an Ambiguous, Unpublished State Court Determination That Has No Precedential Value.

A. The State court determination regarding the application of *United States v. Ruiz*, to McElroy's *Brady* claim is ambiguous.

The state habeas court correctly noted that the Court's holding in *United States v. Ruiz*, did place limits upon *Brady v. Maryland*, at least where a petitioner attempts to challenge the basis of a guilty plea on a purported, antecedent *Brady* violation. SHCR, at 240. Indeed, the state habeas court apparently considered much of McElroy's *Brady* argument to be a challenge to his *guilt*, and not relevant to sentencing. *See* SHCR, at 240 ("By pleading 'guilty,' a defendant waives his right to a contested trial, although the trial court might permit *evidence contesting guilt* in its discretion.") (emphasis added).[12]

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[11] Of course T.S. never testified at sentencing, hence, this analysis presents the counter-factual consideration of non-events, which itself suggests the impropriety of granting certiorari.

[12] The State believes that the ambiguous nature of McElroy's *Brady* argument, especially where McElroy has denied that he committed the sexual assault, invites such interpretation.

While one might interpret the state habeas court's legal analysis to suggest a waiver of prospective *Brady* protection after a guilty plea, given the circumstances of the present case, such an interpretation is far from obvious. And as established below, because the state court provided an alternative legal rational to reject McElroy's *Brady* argument, the Court should deny certiorari.

B. The State court determination included an alternative basis to affirm McElroy's conviction.

During the state habeas proceeding, the trial court provided an alternative legal resolution, finding that McElroy failed to establish materiality because T.S.'s drug use was neither relevant or material to sentencing. SHCR, at 240–41. Further, the state court determined that any inconsistency between T.S.'s statements to police and to the probation officer were "apparent from a plain reading" of the PSR, and thus considered. *Id.*

Because the state court determination regarding materiality was correct, the Court should deny this petition for certiorari.

C. The Texas Court of Criminal Appeals' single sentence denial of McElroy's claim—which included an alternate basis to deny relief—is not important enough to warrant review.

The Texas Court of Criminal Appeals denied McElroy's *Brady* claim in a single sentence. SHCR, at cover. Although that denial referred to the findings of the

trial court, because the findings included two independent legal rationales, there is no reason to assume the Texas Court of Criminal Appeals adopted the trial court's apparent *Ruiz* interpretation. Indeed, the precedential value of such a denial is very limited because it does not reflect a reasoned opinion of the Texas Court of Criminal Appeals, and because it specifically *contradicts* a recent published opinion of the Texas Court of Criminal Appeals that rejects McElroy's interpretation of Texas law. *See Clark v. State*, 270 S.W.3d 573, 579 (Tex. Crim. App. 2008) (defendant who pleaded guilty to sexual assault of a child could assert *Brady* claim that prosecutor failed to disclose his knowledge of the falsity of an extraneous sexual misconduct offense alleged in presentence investigation report).

CONCLUSION

On the basis of the foregoing arguments and authorities, the petition for a writ of certiorari should be denied.

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